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IN THE

# Supreme Court of the United States

No. 04-1618

ZURICH INSURANCE CO. subrogated to the rights of
JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,
*Petitioners,*

v.

CHATHAM COUNTY, GEORGIA,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

## CONSTITUTIONAL PROVISIONS AND STATUTES

The Eleventh Amendment of the U.S. Constitution states:

> "The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Georgia Constitution Article 9, § 2, ¶ 3 (a)(4) states:

> "In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any count, municipality, or any combination thereof may exercise the following powers and provide the following services: Street and road

construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof."

Georgia Constitution Article 1, § 2, ¶ 9 (e) provides:

"Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."

O.C.G.A. § 32-3-1 (a) states:

"Any property may be acquired in fee simple or in any lesser interest, including scenic easements, airspace, and rights of access, by a state agency or a county or municipality through gift, devise, exchange, purchase, prescription, dedication, eminent domain, or any other manner provided by law for present or future public road or other transportation purposes."

O.C.G.A. § 32-3-1 (b) states: "Public road purposes shall include rights of way; detours; bridges; bridge approaches . . . ; and any and all other purposes which may be reasonably related to the development, growth, or enhancement of the public roads of Georgia."

O.C.G.A. § 32-4-42

O.C.G.A. § 32-1-3 (24)(B) states:

"Public road" means a highway, road, street, avenue, toll road, tollway, drive, detour, or other way open to the public and intended or used for its enjoyment and for the passage of vehicles in any county or municipality of Georgia, including but not limited to the following public rights, structures, sidewalks, facilities, and appur-

## STATEMENT OF THE CASE

Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by Respondent Chatham County ("County"). (App. A, Aff. Drewry, ¶ 3) The Bridge is permanently connected to the roadway of Islands Expressway. (App. A, Aff. Drewry, ¶ 3) Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. (App. A, Aff. Drewry, ¶ 3, Exh. 1)

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. (App. A, Aff. Drewry, ¶ 4) The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. (App. A, Aff. Drewry, ¶ 4) The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. (App. A, Aff. Drewry, ¶ 4) The County employs bridge tenders to open the bridge for that purpose. (App. A, Aff. Drewry, ¶ 4)

The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (App. A, Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (App. A, Aff. Drewry, ¶ 5) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5) The County derives no income from operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5)

The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. (App. A, Aff. Drewry, ¶ 7) In the 1980's, a second bridge was constructed when the Islands Expressway was widened to

become a four-lane roadway. (App. A, Aff. Drewry, ¶ 7) There has been no additional construction or reconstruction to the Bridge since the 1980's. (App. A, Aff. Drewry, ¶ 7)

On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. On that date, Mr. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge. (App. B, Aff. Bowers, ¶ 4)

On October 6, 2002, the bridge tender opened the Bridge pursuant to Mr. Ludwig's request. (App. B, Aff. Bowers, ¶ 5) The bridge tender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. (App. B, Aff. Bowers, ¶ 6) The bridge tender was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. (App. B, Aff. Bowers, ¶ 7)

The bridge tender stopped the span and started it back up; however, the Love of My Life hit the span. (App. B, Aff. Bowers, ¶ 8) The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. (App. B, Aff. Bowers, ¶ 9)

Petitioners filed suit in admiralty. After conducting discovery, the parties filed motions for summary judgment. The trial court granted the County's motion for summary judgment, holding that the County was entitled to residual common law sovereign immunity. (Petitioners' Appendix B) On July 1, 2004, Petitioners appealed. The Eleventh Circuit affirmed. (Petitioners' Appendix A)

On July 8, 2004, the Eleventh Circuit Court of Appeals ruled in favor of Respondent in a substantially identical unpublished opinion, set forth in Appendix C, *Continental Ins. Co. v. Chatham County, Georgia*, Case No. 04-10661-F.

The Court of Appeals adopted the trial court's analysis of "common law" sovereign immunity versus Eleventh Amendment sovereign immunity, as set forth in Appendix D.

## REASON FOR DENYING THE WRIT

### I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR GRANTING A WRIT OF CERTIORARI WHEN THERE IS NO CONFLICTING DECISION ON THE ISSUE OF WHETHER CHATHAM COUNTY AS A POLITICAL SUBDIVISION OF THE STATE OF GEORGIA WITH POWER DELEGATED BY THE STATE TO OPERATE, CONSTRUCT AND MAINTAIN BRIDGES, IS ENTITLED TO "RESIDUAL" SOVEREIGN IMMUNITY IN THIS ADMIRALTY CASE

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. There is no split in any of the circuits regarding common law sovereign immunity. There is no conflict between state courts of last resort or between the Georgia Supreme Court and any U.S. Court of Appeals regarding common law sovereign immunity. There is no conflict between a state court or the U.S. Court of Appeals and this Court regarding common law sovereign immunity. Rule 10 (a)-(c). Petitioner is simply trying to convert this case into an Eleventh Amendment case or a state law nuisance case to avoid the County's entitlement to long-standing common law residual sovereign immunity.

The County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity. The County is not asserting Eleventh Amendment immunity. The common law doctrine of sovereign immunity, adopted by

the State of Georgia in 1784, protected governments *at all levels* from unconsented-to legal actions. *Gilbert v. Richardson*, 264 Ga. 744, 745-746, 452 S.E. 2d 476, 477-478 (1994).

In *Chisholm v. Georgia*, 2 Dall. 419 (1793), the U.S. Supreme Court held that Article III of the Constitution authorized citizens of one state to sue another state in federal court. "The decision fell upon the country with a profound shock." *Alden v. Maine*, 527 U.S. 706, 720 (1999). As a result, Congress passed the Eleventh Amendment and the states quickly ratified it. *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 752 (2002). In passing the Eleventh Amendment, Congress only addressed the "specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *Id.* at 753.

Common law sovereign immunity does not derive from and is not limited by the Eleventh Amendment. *Alden, supra*, at 713. States have been afforded sovereign immunity before and after the adoption of the Eleventh Amendment. *Id.* Referring to a state's immunity from suit as "Eleventh Amendment immunity" is a misnomer. *Id.* The adoption of the Eleventh Amendment was not intended to limit sovereign immunity to the "narrow text of the Eleventh Amendment. . . ." *Id.* at 723-724. "[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Commission, supra*.

The County acknowledges that Eleventh Amendment immunity does not extend to counties. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). The County also acknowledges that the Court in *Alden* stated that sovereign immunity does not extend to lesser entities which are *not* arms of the state. *Alden, supra*, at 756-757.

The County is an arm of the state and is entitled to sovereign immunity under the universal rule of state immunity from suit without its consent. *Broward County, Florida v. Wickman*, 195 F. 2d 614, 615 (5th Cir. 1952)[1]. In *Wickman*, a federal admiralty case, a yacht was damaged after striking an underwater projection that was part of the abutment of a drawbridge owned and operated by Broward County. Suit was brought in personam in admiralty against Broward County. *Id.* Broward County asserted that as a political subdivision of the state it was entitled to immunity. *Id.* at 614-615. The Court held that Broward County as a political subdivision of Florida was immune from suit in admiralty. *Id.* at 615 (citing *Ex parte State of New York*, 256 U.S. 490 (1921)).

The Court in *Wickman* relied on state law, *Keggin v. County of Hillsborough*, 71 Fla. 356, 71 So. 372 (1916), to determine if Broward County was an arm of the state. *Wickman, supra*, at 615. The Court in *Wickman* noted that in *Keggin*, which addressed a county's liability for damage caused by a "defective bridge," the *Keggin* court held that the county is a political subdivision of the state, performs functions of a public nature, and is an agency through which many of the powers of the state are exercised. *Wickman, supra*, at 615. Additionally, it noted that the *Keggin* court held that the building of roads and bridges, and the maintenance thereof, are functions of the state because the state delegates these duties to the political subdivision which acts as an agent for the public at large. *Id.*

In operating and maintaining the Bridge, Chatham County is an arm of the State of Georgia. Chatham County is a political subdivision of the State of Georgia. *Holmes v.*

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[1] In *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

*Chatham Area Transit Authority*, 234 Ga. App. 42, 45, 505 S.E. 2d 225, 227 (1998); *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 41, 440 S.E. 2d 195, 196 (1994); *Wojcik v. State*, 260 Ga. 260, 262, 392 S.E. 2d 525, 527 (1990). The County has been delegated power by the State to operate, construct and maintain bridges. Georgia Constitution Article, 9, § 2, ¶ 3 (a)(4), authorizes counties to provide for street and road construction and maintenance. Counties are authorized to acquire property for public road purposes. O.C.G.A. § 32-3-1 (a). "Public road purposes" includes bridges. O.C.G.A. § 32-3-1 (b). O.C.G.A. § 32-4-42 sets forth the powers of counties regarding county road systems and refers to public roads. (App. E) The definition of "public road" includes bridges. O.C.G.A. § 32-1-3 (24)(B).

Chatham County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (App. A, Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (App. A, Aff. Drewry, ¶ 5) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5) The County derives no income from operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5) The County acts as a State agent for the public at large by performing the state governmental function of operating and maintaining the Bridge pursuant to explicit authority delegated by the State. *See* O.C.G.A. § 32-3-1 (b) which refers to the development, growth, or enhancement of the public roads of *Georgia*.

The immunity afforded under *Wickman* is not based on principles of Eleventh Amendment immunity but is based on the universal rule of state immunity from suit without the state's consent. *Wickman, supra; Ex parte State of New York, supra*. Although the Eleventh Amendment explicitly applies to suits in law or equity and not admiralty, it has been construed as applying in admiralty. *Ex parte State of New*

*York, supra*, at 498. Likewise, the admiralty and maritime jurisdiction is not exempt from the fundamental rule that a state may not be sued without its consent. *Id.* at 497. The Eleventh Amendment "is but an exemplification of this fundamental rule." *Id.* The *Wickman* decision, which relies on this fundamental rule in applying sovereign immunity to counties, is cited in 134 ALR Fed[2] 537, § 2 (b) and 2 Am Jur 2d, Admiralty[3], § 51, as authority that the exemption of states from suits in admiralty applies to state subdivisions such as counties. The Court in *Wickman* had available to it the U.S. Supreme Court case of *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), which stated that counties are not protected by the Eleventh Amendment from suit in federal court.

The Court in *Wickman* distinguished *Workman v. Mayor of the City of New York*, 179 U.S. 552 (1900), upon which Petitioners rely. The Court stated that *Workman* is inapposite because it addresses substantive admiralty law, not the Court's power to exercise jurisdiction over the person of the defendant. *Wickman, supra.* The *Wickman* court concluded that nothing in *Workman* overrules the view that "a state and its political subdivisions are immune from process in actions of this character, even in admiralty." *Id. See also J. Ray McDermott & Co. v. Department of Highways, State of Louisiana*, 267 F. 2d 317, 318 (5th Cir. 1959), cert. denied, 361 U.S. 914 (1959), which stated that *Wickman* has settled it for this circuit that the "immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear."

Petitioners' reliance on *Vierling v. Celebrity Cruises, Inc.*, 339 F. 3d 1309 (11th Cir. 2003), is misplaced. The issue in *Vierling* is whether the Eleventh Amendment applies to the Port Authority of Broward County. *Id.* at 1313. The County

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[2] 134 ALR Fed was published in 1996.

[3] 2 Am Jur 2d, Admiralty, was published in 1994.

is not asserting sovereign immunity based on the Eleventh Amendment. (Petitioner's App. A, p. 3a, n. 1) Additionally, the Port Authority was performing proprietary functions in *Vierling*. *Id.* at 1314 n. 15.

The Court in *Vierling* did not effectively overrule *Wickman*. It simply stated that it was not persuaded that the Port Authority was an arm of the state under the reasoning of *Keggin, supra*, because the Port Authority was performing proprietary functions. *Vierling, supra*, 339 F. 3d at 1315, n. 15. It further stated that the decision of *Canaveral Port Authority v. Department of Revenue*, 690 So. 2d 1226, 1228 (Fla. 1996), cast doubt "on the extent to which counties performing proprietary functions—such as providing passenger loading services—are considered the state for purposes of immunity." *Id.*

Case law makes a distinction between the liability of counties and cities in admiralty cases because municipal corporations under local charters perform corporate functions in building and operating bridges, and counties exercise delegated state powers and governmental functions in the construction and maintenance of roads and bridges. *See Pelican Marine Carriers, Inc.*, 791 F. Supp. 845, 856 (M.D. Fla. 1992), aff'd without opinion, 4 F. 3d 999 (11th Cir. 1993), citing a line of cases addressing laws applicable to municipal corporations. *See also* 2 Am Jur 2d, Admiralty, § 51, and 134 ALR Fed 537, § 2 (b).

Petitioners' reliance on *Hines v. Georgia Ports Authority*, 278 Ga. 631 (2004), is without merit. The Court in *Hines* addressed whether the Georgia Ports Authority is entitled to Eleventh Amendment immunity for admiralty claims and concluded that it is not. *Id.* at 633, 637, 604 S.E. 2d at 192, 195. The Court in *Hines* did not address residual common law sovereign immunity. *Id.* at 633-637, 604 S.E. 2d at 192-195. It only addressed Eleventh Amendment immunity. *Id. See* Order of U.S. District Court, filed June 10, 2005, denying

Petitioners' motion for relief from judgment and addressing *Hines*. (App. F) *See also* Order of U.S. District Court, filed April 22, 2005, denying Plaintiffs' motion for relief from judgment in *Dennis K. Rings and Continental Insurance Company v. Chatham County, Georgia*, 403CV038. (App. G)

The County has not waived its sovereign immunity under state law. Georgia Constitution Article 1, § 2, ¶ 9 (e) provides:

> "Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can *only* be waived by an Act of the General Assembly which *specifically* provides that sovereign immunity is thereby waived and the extent of such waiver." (emphasis added)

This Constitutional provision, which amended the 1983 Constitution in 1991, applies to counties. *Gilbert v. Richardson, supra*, 264 Ga. at 746-747, 452 S.E. 2d at 478-479. The County's sovereign immunity can *only* be waived by a *specific act* of the General Assembly. Georgia Constitution Article 1, § 2, ¶ 9 (e); *Gilbert, supra*. This Constitutional provision became effective on January 1, 1991, and therefore applies because the incident at issue occurred on October 6, 2002.

Sovereign immunity "can *only* be waived pursuant to a '*legislative act which specifically provides thât sovereign immunity is waived and the extent of such waiver.*'" *Woodard v. Laurens County*, Ga., 265 Ga. 404, 405, 456 S.E. 2d 581, 582-583 (1995) (citing *Gilbert, supra*, at 748, 452 S.E. 2d at 479-480). (emphasis added) It cannot be waived by the mere purchase of insurance coverage. *Id.* In *Gilbert*, the Gilberts sued the Walker County Sheriff. *Gilbert, supra*, at 745, 452 S.E. 2d at 478. In *Gilbert*, the county's sovereign immunity was waived pursuant to O.C.G.A. § 33-24-51 (b) to

the extent of the amount of liability insurance purchased for the negligence of county officers, agents, servants, attorneys, or employees arising from the use of a motor vehicle and pursuant to O.C.G.A. § 36-85-1 which authorizes counties to participate in GIRMA (Georgia Interlocal Risk Management Agency). *Gilbert, supra*, at 748-749, 751-752, 452 S.E. 2d at 480-483.

The County has not waived its sovereign immunity pursuant to any legislative act because it does not participate in GIRMA nor has it purchased any liability insurance for claims arising from the use of a motor vehicle. *See also Woodard, supra, and Long v. Hall County Board of Commissioners*, 219 Ga. App. 853, 856-857, 467 S.E. 2d 186, 189-190 (1996). The General Assembly has not waived sovereign immunity for damages caused by county maintained bridges. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850, 470 S.E. 2d 479, 480-481 (1996).

Petitioners' assertion that Respondent maintained a continuing nuisance is without merit. A county cannot be liable for a nuisance except in the context of taking private property for public purposes resulting in an inverse condemnation. *Canfield v. Cook County*, 213 Ga. App. 625, 626, 445 S.E. 2d 375, 376 (1994). Petitioners do not allege the taking of private property or inverse condemnation nor do they allege that their boat was damaged by the Causton Bluff Bridge on more than one occasion. *See DeKalb County v. Orwig*, 261 Ga. 137, 139, 402 S.E.2d 513, 515 (1991). Petitioners' allegations are more in the nature of a tort, inflicting in one act direct injury to Petitioners' boat, especially since they allege that Respondent had a duty to operate and maintain the Bridge in a reasonably safe and prudent manner and breached a duty to them. *See Desprint Services, Inc. v. DeKalb County*, 188 Ga. App. 218, 220, 372 S.E. 2d 488, 490 (1988).

Petitioners' reliance on O.C.G.A. § 32-4-71 (b) is misplaced. It provides in relevant part that if "the condition of

bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county. . . ." O.C.G.A. § 32-4-70 (b) provides in relevant part that "[w]here the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the performance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years." The Causton Bluff Bridge was constructed in 1963 and in the 1980's a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (App. A, Aff. Drewry, ¶ 7) The seven year period has passed and therefore this provision does not apply.

Petitioners' assertion that Respondent's employees negligently performed ministerial functions is misplaced. Petitioners did not name any employees of Respondent in this action. It is true that a county may be liable for a county employee's negligence in performing an official function to the extent that the county has *waived* sovereign immunity. *Gilbert, supra*, at 754, 452 S.E. 2d at 484. Respondent has not waived its sovereign immunity. The distinction between ministerial and discretionary acts with regard to governing authorities appears to apply to municipalities and not counties. *See Early County v. Fincher*, 184 Ga. App. 47, 49, 360 S.E. 2d 602, 604 (1987) (*Early* predated the amendment to Georgia Constitution Article 1, § 2, ¶ 9 (e), which provides for a waiver of sovereign immunity only by a legislative act.)

The other cases relied on by Petitioners address whether individual officials are entitled to official immunity and focus on the particular functions performed by the *individual*

officials. *Woodard, supra* (Court discussed the determination of ministerial and discretionary acts in connection with actions of a county employee; the County was also afforded sovereign immunity. *Id.* at 406-407, 456 S.E. 2d at 583-584); *Stone v. Taylor*, 233 Ga. App. 886, 506 S.E. 2d 161 (1998) (Court addressed distinction between discretionary and ministerial acts in its discussion of whether two county officials were liable. *Id.* at 887-889, 506 S.E. 2d at 162-164).

Sovereign immunity, also referred to as "governmental immunity," applies to governmental entities such as counties. *Norris v. Emanuel County*, 254 Ga. App. 114, 116, 561 S.E. 2d 240, 242-243 (2002). Official immunity applies to government officials and employees sued in their individual capacities. *Id.* The distinction between discretionary and ministerial acts applies in the determination of official immunity in claims against government officials and employees, not counties. *See Norris, supra*, at 117, 561 S.E. 2d at 243. *See also Early County, supra*, at 49, 360 S.E. 2d at 604-605 (predates 1991 Constitutional amendment, discussed earlier; however, this case states that counties' sovereign immunity extends to ministerial *and* discretionary acts); and *Kordares, supra*, at 849-850, 470 S.E. 2d at 480-481.

## CONCLUSION

The Eleventh Circuit Opinion and District Court Opinion correctly applied the controlling precedent of this Court and did not erroneously decide any questions of law. Respondent is entitled to residual common law sovereign immunity. The petition should be denied.

Respectfully submitted,

EMILY E. GARRARD *
CHATHAM COUNTY
ATTORNEY'S OFFICE
P.O. Box 8161
Savannah, GA 31412
(912) 652-7881

* Counsel of Record

*Attorney for Respondent*

# APPENDICES

# APPENDIX A

STATE OF GEORGIA
COUNTY OF CHATHAM

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## AFFIDAVIT OF ROBERT DREWRY

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, ROBERT DREWRY, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as the Director of Public Works and Park Services. My department is responsible for operating and maintaining the bridges which are owned by the County.

3. Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by the County. The Bridge is permanently connected to the roadway of Islands Expressway. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. A copy of an aerial photograph showing the Bridge is attached hereto as Exhibit 1.

4. The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counter-

weights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the bridge for that purpose. The Bridge is not used as a navigational aid.

5. The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. There is no charge to anyone for crossing the Bridge. Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. The County derives no income from operating and maintaining the Bridge.

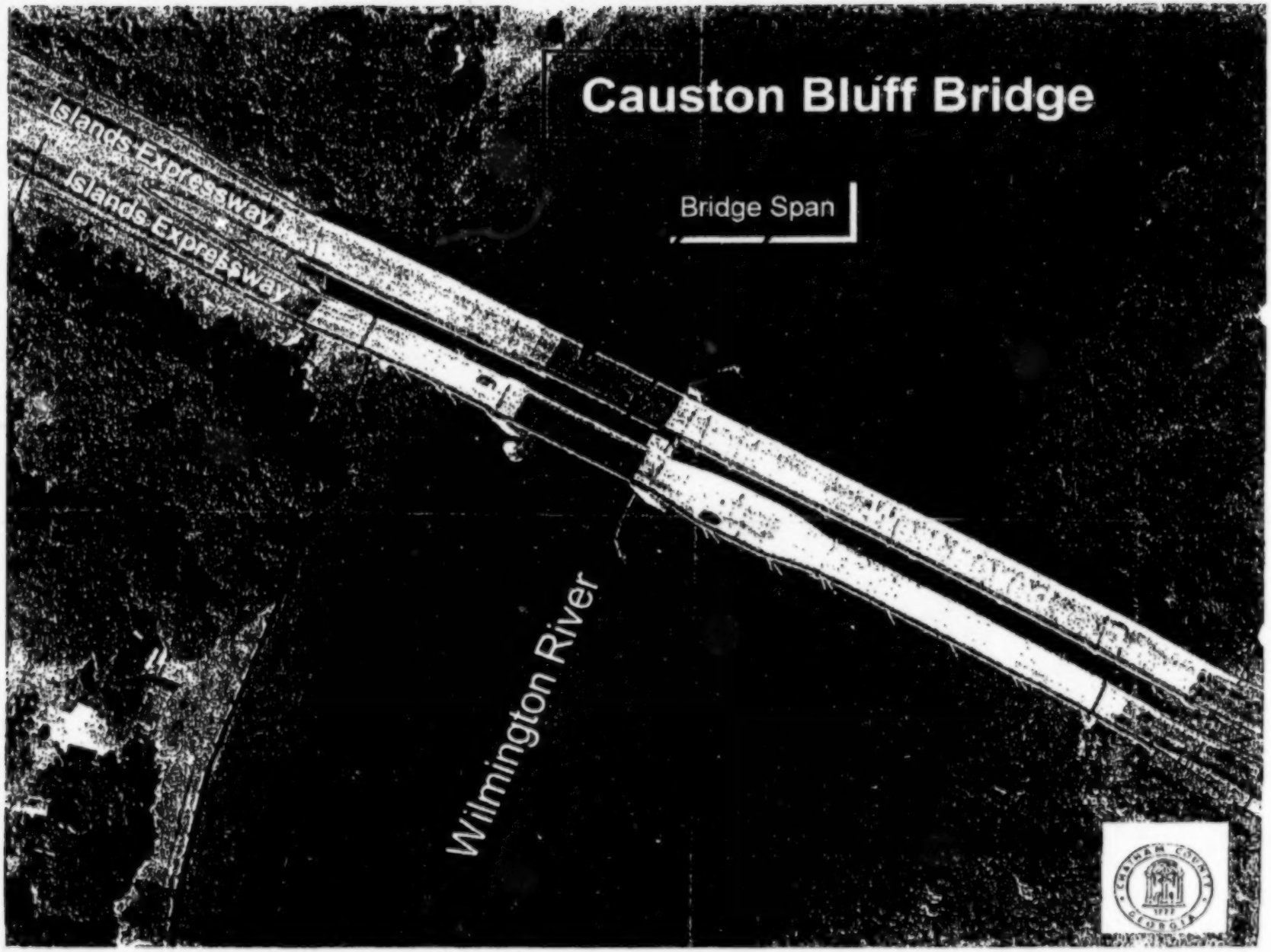
6. The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. The spans do not make contact with the water.

7. Official records maintained in the ordinary course of business in the Public Works and Park Services Department show that the Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. There has been no additional construction or reconstruction to the Bridge since the 1980's.

Further deponent sayeth naught.

/s/ Robert Drewry
ROBERT DREWRY

Sworn to and subscribed before me,
this 10th day of November, 2003
/s/ Dawn P. Carter, Notary Public


Causton Bluff Bridge
Bridge Span
Islands Expressway
Islands Expressway
Wilmington River

## APPENDIX B

STATE OF GEORGIA
COUNTY OF CHATHAM

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### AFFIDAVIT OF WESLEY BOWERS

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, WESLEY BOWERS, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as a bridge tender. I work in the bridges section of the Public Works and Parks Services Department. I sit in the bridge house of County bridges and open the bridges upon request from captains of vessels.

3. On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. On that date, I was the bridge operator of the Causton Bluff Bridge ("Bridge").

4. On October 6, 2002, James K. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge.

5. On October 6, 2002, I opened the Bridge pursuant to Mr. Ludwig's request.

6. I noticed that the north west span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig.

7. I was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area.

8. I stopped the span and started it back up; however, the Love of My Life hit the span.

9. The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. Further deponent sayeth naught.

/s/ Wesley Bowers
WESLEY BOWERS

Sworn to and subscribed before me,
this 18th day of November, 2003
/s/ Patricia Washington, Notary Public

**APPENDIX C**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed July 8, 2004]

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No. 04-10661
Non-Argument Calendar

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D.C. Docket No. 03-00038-CV-4

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CONTINENTAL INSURANCE COMPANY,
Subrogated to the rights of Dennis K. Rings,
*Plaintiffs-Appellants,*

versus

CHATHAM COUNTY, GA,
*Defendant-Appellee.*

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Appeal from the United States District Court
for the Southern District of Georgia

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BEFORE TJOFLAT, BIRCH and DUBINA, *Circuit Judges.*

PER CURIAM:

In a comprehensive order dated January 14, 2004, the district court held that appellee Chatham County, Georgia is entitled to sovereign immunity from appellants' suit for damages sustained when a span of a draw bridge operated by the County struck appellant Riggs' vessel while it passed beneath the bridge. The court therefore granted the County summary judgment.

Appellants now appeal, contending that the district court erred in granting the County sovereign immunity and in denying their motion for summary judgment. Their appeal therefore turns on whether the court properly applied the law relating to sovereign immunity. We find no error in the court's ruling. We adopt its analysis of "common law" sovereign immunity versus Eleventh Amendment sovereign immunity and affirm the court's judgment.

AFFIRMED.

## APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

[Filed Jan. 14, 2004]

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No. 403CV038

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CONTINENTAL INSURANCE COMPANY,
subrogated to the rights of DENNIS K. RINGS,
*Plaintiff*,

v.

CHATHAM COUNTY, Georgia,
*Defendant*.

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ORDER

### I. INTRODUCTION

Plaintiffs Dennis K. Rings and his insurer, Continental Insurance Company ("CIC," on subrogration) bring this in *personam* vessel-damages admiralty action against Chatham County, Georgia, an intercoastal waterway draw bridge owner/operator. Doc. # 1. The County concedes that when it raised its bridge one of its bridge spans struck and damaged Rings's vessel while it passed beneath, but moves for summary judgment on sovereign immunity grounds. Doc. # 25. Plaintiffs move for summary judgment against the County, insisting that no such immunity applies and that the County's negligence supports their recovery. Doc. # 21.

### II. BACKGROUND

The County owns and operates the "Causton Bluff Bridge," which is part of a multi-lane public road connecting Savan-

nah, Georgia with outlying islands. Doc. # 16 exh. A ¶¶ 3-5. The taxpayer-funded, non-revenue collecting/generating bridge crosses over an intercoastal waterway. *Id.*

Emphasizing that taxpayers pay to maintain/operate the bridge and that it collects no revenue from it, the County insists it exercised delegated State:power while operating the bridge on the day it damaged Rings's vessel. Doc. # 18 at 2; # 16 ¶¶ 3-6. Mindful that counties have been held to have waived sovereign immunity to the extent they have purchased insurance, the County also points out that it has no insurance for bridge mishaps. Doc. # 16 exh. C.

## III. ANALYSIS

### A. Sovereign Immunity

The County is "*not* asserting sovereign immunity based on the Eleventh Amendment immunity,[1] doc. # 25 at 1 (emphasis added), a defense a Florida county unsuccessfully invoked in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003). Rather, it raises "common law" sovereign immunity illuminated in *Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994) and *Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) ("FMC"). *Id.* at 2-3.

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[1] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. *See US. v. Texas Tech Univ.*, 171 F.3d 279, 285 n. 9, 288 (5th Cir. 1999) (Eleventh Amendment immunity deprives court of subject matter jurisdiction); *id.* at 285 ("While often noted for preserving state sovereignty, the Amendment only accomplishes this end through jurisdictional limitation").

Retracing the pre-Eleventh Amendment, "none-can-sue-the-king" sovereign immunity in *FMC*, that court characterized it as "residual and inviolable sovereign immunity. " 535 U.S. at 570 (quotes and cite omitted). States, that court explained, ceded to the federal government (under Article I of the U.S. Constitution) only so much of their sovereignty as was necessary to form the United States of America. *Id.* at 572. Hence, "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999).

But this sovereign immunity was placed "into peril" when *Chisholm v. Georgia*, 2 Dall. 419 (1793), held that Article III of the Constitution authorized citizens of one State to sue another in federal court. *FMC*, 535 U.S. at 752. Congress and the States overturned Chisholm by passing the Eleventh Amendment. *See supra* note I.

In choosing that Amendment's text, Congress did not "explicitly memorializ[e] the full breadth of the sovereign immunity retained by the States," but chose only "to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *FMC*, 535 U.S. at 753 (quotes and cite omitted).

Otherwise, "the sovereign immunity enjoyed by the States extends *beyond* the literal text of the Eleventh Amendment." *Id.* at 754 (emphasis added).[2] The Eleventh Amendment was

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[2] Too, the Supreme Court has strengthened State sovereign immunity in recent years. *See Alden*, 527 U.S. at 712 ("the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (Congress lacks power under Article I to abrogate States' sovereign immunity from suits commenced or prosecuted in federal courts).

passed simply to restore the original constitutional design (*i.e.*, States were to retain their residual sovereign immunity and thus could not be sued in any court absent their consent). *Alden*, 527 U.S. at 713-30.

The *FMC* court held that State sovereign immunity bars the Federal Maritime Commission from adjudicating complaints filed by a private party against a nonconsenting State. *Id.* at 769. In other words, the State's sovereign immunity in that case precluded the Federal Maritime Commission from adjudicating a private party's complaint that the State-run port had violated the Shipping Act of 1984. *Id.* Absent its consent, then, a State cannot be "sued" in an agency tribunal, either.

It should be no surprise, then, that "the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent is clear." *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), *reaffirmed in* FMC, 535 U.S. at 754, 767.[3]

Here the County insists that it is a political subdivision of the State, so the Court should deem it immune under the above reasoning, as well as that set forth in *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952) (A Florida county, as a political subdivision of State, was immune in absence of consent from suit in admiralty for damages which

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[3] "While [such] immunity from suit is not absolute, the Supreme Court has recognized only two situations where an individual may sue a state: where suit is authorized by Congress in the exercise of its power to enforce the Fourteenth Amendment, and where a state has waived its sovereign immunity by consenting to suit." 2 MODERN TORT LAW: LIABILITY AND LITIGATION § 16:6 n. 1 (*State Governmental Immunity—in General*) (2d ed. Aug. 2003). Otherwise, "Congress lacks power under Article I to abrogate states' sovereign immunity from suits commenced or prosecuted in federal court. . . . [It also] lacks power under Article Ito subject a nonconsenting state to private suits for damages in its own courts as well." *Id.* § 16.6.

resulted when yacht struck an underwater projection which was part of abutment of drawbridge, owned by county, through which yacht was passing). Doc. # 25 at 3.

The *Broward County* court did not cite the Eleventh Amendment, but did cite *New York* and *Workman v. City of New York*, 179 U.S. 552, 570 (1900), to conclude that a Florida county which owned/operated a public bridge using power delegated from the State enjoyed sovereign immunity *from admiralty process*, 195 F.2d at 615, which is functionally the same as saying "immune from admiralty suit."

The result there was not, that court pointed out, inconsistent with *Workman's* holding that State immunity law could not trump substantive admiralty law over New York City, where "it was *assumed* that the City . . . was subject to admiralty process." *Id.* (emphasis added). Thus, although it did not expressly say so, the *Broward County* court applied "residual sovereign immunity" to immunize Broward county from the admiralty claims there.

At the same time, that court respected the rule, emanating from prior Supreme Court precedent, that where a city or some other municipal entity is otherwise before an admiralty court, admiralty law will preempt State immunity or limitation laws. 195 F.2d at 615.[4]

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[4] *Workman* is thus best viewed as a preemption (*i.e.*, federal admiralty law preempts conflicting state law) case:

> Thus, state laws which defeat existing maritime rights or enlarge existing maritime liabilities are traditionally preempted. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (state statute of frauds may not be applied to defeat maritime breach of contract claim); *see also State of Md. Dept. of Natural Resources v. Kellum*, 51 F.3d 1220, 1226-28 (4th Cir. 1995) (applying admiralty preemption doctrine to prevent application of state statute that purported to increase the existing standard of care under maritime law in certain maritime tort actions).

*Great Lakes Dredge and Dock Co. v. City of Chicago*, 1996 WL 210081 at * 1 (N.D.Ill.1996) (unpublished).

B. "Part of the State"

The bottom line, then, is this: Whatever government entity is being sued, the first line of inquiry is whether it may be deemed a part of the State (a subdivision, agency, etc., exercising actual or delegated State power). If it can be so deemed, then that defendant may invoke residual sovereign immunity, of which Eleventh Amendment immunity may be viewed as a mere subset. *See Principe Compania Naviera, S.A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (Under Eleventh Amendment, court does not have jurisdiction to entertain a suit in admiralty against state or state agency which is an *integral part* of the state government; so, admiralty actions against *counties*, municipalities and other lesser governmental agencies and corporations which have an existence independent of state are not within the Eleventh Amendment's purview; since board of commissioners of the Port of New Orleans is not the state of Louisiana, the Eleventh Amendment did not bar invocation of admiralty jurisdiction in a shipowner's action against the Board for a maritime tort); *J. Ray McDermott & Co. v. Dep't of Highways, State of La.*, 267 F.2d 317, 318 (5th Cir. 1959) (applying "residual sovereign immunity" only—hence, *not* Eleventh Amendment immunity—to hold that State highway department could not be made to stand in judgment in a tort action in admiralty arising out of collision of libellant's barges with a bridge on a highway maintained by the department since the department is a department of the state which has not given its consent to be sued).

If the entity in question is not part of the State, then it does not matter if it claims to have been exercising a "governmental function." It remains amenable to *in personam* admiralty process and thus may be recovered against in admiralty court. To summarize:

> The rule of nonliability for torts where a *municipality* [*i.e.*, a city, not necessarily a county] is exercising a

> purely governmental function is not enforced in the admiralty courts.. The United States Supreme Court has held [in *Workman*, 179 U.S. at 570] that "in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." [*Id.*] The United States Supreme Court has announced the doctrine that for every maritime tort there is redress if the admiralty court has jurisdiction of the offending person or thing. [In contrast,] *a quasi-municipal corporation, if immune from process in the state, would be immune from process in a suit in admiralty for a maritime tort.*

18 MCQUILLIN MUN. CORP. § 53.25 (3rd ed. Aug. 2003) (footnotes omitted; emphasis added); *Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1110 (N.D. Cal. 2002) ("[i]t has long been settled that a federal court exercising admiralty jurisdiction must respect a *state's* sovereignty") (emphasis added) (citing *New York*, 256 U.S. at 497-500; (1921); *Workman*, 179 U.S. at 566).

Sovereign-immunity determining courts, then, typically inquire whether the governmental entity being sued was exercising power delegated from the State, as opposed to acting in proprietary way (like a private corporation that constructs a bridge and charges tolls):

> [N]ot all public entities are possessed of the attributes of sovereignty that the state possesses. Lower courts are to determine a public entity's sovereignty "not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. at 500, 41 S.Ct. 588. *See also Workman*, 179 U.S. at 570, 573-74, 21 S.Ct.

> 212 (city is not a sovereign and may be sued in admiralty despite state law holding city immune from such suits).

*Michaeledes*, 202 F. Supp. 2d at 1111. Substance trumped nomenclature in *Michaeledes* because the action there in fact was against "'a municipal corporation or other governmental entity which is not an arm of the State.'" *Id.* (*quoting Alden*, 527 U.S. at 756); *see also id.* at 1112-13 (Golden Gate Bridge, Highway and Transportation District, although a "public entity" under California Tort Claims Act, was not an "arm of the state" entitled to assert sovereign immunity defense against injured employee's federal-court unseaworthiness claim; there was no evidence that judgment against District would be enforceable against state and no evidence that state exercised any decision-making authority for District or had any supervisory responsibility for District).

The issue at this juncture, then, is whether Chatham County has acted as a proprietary bridge operator or as an arm of the State. Under the narrower slice of sovereignty preserved by the Eleventh Amendment, case law allows county sheriff departments exercising State power to switch (county versus State) hats to invoke *Eleventh Amendment* immunity, depending on which sort of power they exercise:

> In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an "arm of the State" in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.

*Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003); *accord Vierling*, 339 F.3d at 1314 ("Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled

to invoke its sovereign immunity from suit") (quotes and cite omitted).

But *Manders* and *Vierling* focused on the narrower, Eleventh Amendment immunity,[5] not the broader swath of residual sovereign immunity *FMC* illuminated.[6] In the latter

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[5] Again, the County is not invoking the Eleventh Amendment, except in the sense that it may be viewed as a subset of residual sovereign immunity (though, as noted *supra* note 1, that Amendment also is viewed as an express, federal-court-jurisdiction-limiting response to *Chisholm*).

In any event, the Court acknowledges precedent showing that defendants invoking Eleventh Amendment immunity must prove its applicability. *Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001). In contrast to "residual sovereign immunity," that ordinarily takes some doing. *See Vierling*, 339 F.3d at 1314-15; *Grimshaw v. South Florida Water Management Dist.*, 195 F.Supp.2d 1358, 1363-65 (S.D.Fla. 2002) (Regional water management district was arm of State of Florida entitled to Eleventh Amendment immunity; Florida legislature defined districts as operating under state control to perform state function with regional component, Florida exercised virtually absolute control over district's personnel, budget, policies and operations, Florida provided substantial portion of district's funds and exercised budget item control over all its resources, and, as practical matter, state's treasury was directly implicated by any judgment against district, both through budget and importance to State's future of maintaining financial viability of district).

Here, unsurprisingly, the County cites little compared to the water-management district's showing in *Grimshaw*. It points out that "taxpayer" dollars fund the bridge, doc. # 17 at 1-2, but does not indicate whether *State* versus *County* tax dollars are used (though, the State does authorize it to collect taxes). It also points out that Georgia law authorizes counties to provide for road construction and maintenance, acquire property for both roads and bridges, and thus exercise State delegated powers and governmental functions in constructing and maintaining roads and bridges. *Id.* at 5. But in contrast to what was shown in *Grimshaw*, it does not say much with respect to the degree of control the State exercises over it. In a later brief, the County basically just points to Georgia law showing that it is cloaked in the State's residual sovereign immunity until waiver is shown. Doc. # 25.

[6] Where residual sovereign immunity is shown, incidentally, Georgia courts place the burden on those opposing it to show that it has been

cases, Georgia courts scrutinize the overall intent and contour of the county entity, along with the stream of State power in which it navigates. "[T]here are a number of decisions holding," for example, Georgia

> county departments of family and children services [DFACS] to be instrumentalities of the state for other purposes. *See Horne v. Skelton*, 152 Ga.App. 654, 655(1), 263 S.E.2d 528 (county department of family and children services found to be an instrumentality of the state when power to appoint county director by the commissioner of DHR involved); *Employees Retirement System of Ga. v. Baughman*, 241 Ga. 339, 245 S.E.2d 282 (DFACS employees are state employees for the purpose of determining retirement benefits); and *Ga. Dept. of Human Resources v. Demory*, 138 Ga.App. 888, 227 S.E.2d 788 (DFACS determined to be a state instrumentality distinct from Hall County Board of Health, a county instrumentality, for purposes of workers' compensation). *Also see Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D.Ga. 1989) (DFACS is instrumentality of the state for the purpose of Eleventh Amendment immunity).

*Floyd County Grand Jury v. Dept. of Family & Children Servs.*, 218 Ga.App. 832, 834 (1995); *compare Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir.1990) (School board in Alabama county was not arm or alter ego of state, for Eleventh Amendment immunity purposes).

*Floyd County*'s holding is consistent with the Georgia State government's basic contours; counties are geographical subdivisions administering (as do the County police, for

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waived. *CSX Transp., Inc. v. City of Garden City, Georgia*, 196 F.Supp.2d 1288, 1293 n. 5 (S.D.Ga. 2002), *aff'd in part and remanded for further proceedings*, F.3d, 2004 WL 491 17 (11th Cir. 1/12/04).

example) State-delegated (called "Home rule" and "Supplementary") powers at the county (local) level. *See Gilbert*, 264 Ga. at 747; Ga. Const. 1983, *as amended* 1991, Art. 9, § 1 ¶¶ 2-3. Counties, then, by power-decentralizing *design*, are political subdivisions of the State entitled to the same sovereign immunity as the State when they exercise State power.

Plaintiffs do not dispute that Georgia's constitution extends sovereign immunity to the state, its departments, agencies and also its counties. *Gilbert*, 264 Ga. at 747. Nor do they dispute that counties exercise State power to acquire land and build/operate roads and bridges. *See* O.C.G.A. § 32-4-92 (preamble) (enumerating State's delegation of its powers to a county with respect to county road systems); *id.* § 32-4-92(3)(A) (counties may exercise the State's power to condemn land for roads); *id.* § 32-4-92(8) & (11) (county can exercise the State's power to tax for roadbuilding/maintenance purposes); § 32-4-70-§ 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same); *see also* § 32-4-90 *et seq.* (delegation of State power to municipalities for municipal street systems, including bridges).

The County, in acquiring the land and constructing/operating the public highway and bridge in question, exercised that very State power. And its mere act of building/operating roads and bridges does not waive its sovereign immunity. *See Kordares v. Gwinnett County*, 220 Ga.App. 848, 849-50 (1996) (County was protected by sovereign immunity from negligence claim arising from death of decedent who was killed when he attempted to cross county bridge, and bridge partially collapsed).[7]

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[7] This is not a new concept. *See Mann v. County Bd. of Arlington County*, 98 S.E.2d 515, 518 (Va. 1957) (Even though Arlington County had taken on characteristics of city and exercised many powers and

Indeed, courts more or less *presume* that when a county exercises State power (*e.g.*, police power) the State's sovereign immunity extends to it until the challenging party shows otherwise (*e.g.*, that the county waived its sovereign immunity by purchasing insurance). *See Smith v. Chatham County*, Ga.App., 2003 WL 22700904 at * 1 (11/17/03) (County had not purchased liability insurance for damages arising from negligence of duly authorized officer in performance of his official duties, and thus, county did not waive sovereign immunity from liability for injuries sustained by motorists when truck pursued by police officers collided with motorists' vehicle)[8]; *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir.1993) ("The state of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or

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performed many services customarily rendered by municipal corporations, and even though it had elected to operate its own system of roads, nevertheless "[i]n Virginia, territorially and politically, counties are integral parts of the State," so the county could not be held liable for injuries sustained by a pedestrian when an automobile crossed the curbing between a parking area and a sidewalk and crushed the pedestrian against a store front, allegedly as a result of the county's negligence in maintaining a parking area immediately adjacent to the sidewalk and in permitting motor vehicles to be parked perpendicular to the curb without stanchions or other safeguards to prevent their entering upon the sidewalk), cited in 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 399 (May 2003) ("[T]the view has been followed that, in the absence of statutory authorization, counties are generally not liable for injuries to persons or property caused by defects in their highways, streets, and bridges") and *id.* § 120.

[8] There the court noted that

> [t]he doctrine of sovereign immunity protects governments from legal action unless they have waived their immunity from suit. The immunity, at least for counties, may only be waived by a legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver.

2003 WL 22700904 at * 1 (footnote omitted).

statute. This sovereign immunity extends to counties, as subdivisions of the state").

Here the County has no immunity-waiving insurance, and plaintiffs have not otherwise shown that the State or County waived the County's sovereign immunity. Nor is the County otherwise before the Court but attempting to invoke an admiralty-preempted State statute aimed at defeating or impinging admiralty law. See supra note 4.

## IV. CONCLUSION

Accordingly, the Court *GRANTS* Chatham County, Georgia's motion for summary judgment (doc. # 16, as amended, doc. # 24), *DENIES* plaintiffs' motion for summary judgment (doc. # 21) and *DISMISSES* plaintiffs' Complaint *WITH PREJUDICE.*

This 14th day of January, 2004.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD, Judge
United States District Court
Southern District of Georgia

## APPENDIX E

§ 32-4-42. Powers.

The powers of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall have the authority to negotiate, let, and enter into contracts with any person or any agency, county, or municipality of the state for the construction, maintenance, administration, or operation of any public road or activities incident thereto in such manner and subject to such express limitations as may be provided by Part 2 of this article or any other provision of law. A county shall also have the authority to perform such road work with its own forces or with a combination of its own forces and the work of a contractor, notwithstanding any contrary provisions of Chapter 91 of Title 36;

(2) A county shall have the authority to accept and use federal and state funds and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid or state-aid acts and programs in connection with the county's public roads. Nothing in this title is intended to conflict with any federal law and, in case of such conflict, such portion as may be in conflict with such federal law is declared of no effect to the extent of the conflict;

(3)(A) A county shall have the authority to acquire and dispose of real property or any interest therein for public road purposes, as provided in Article 1 of Chapter 3 of this title and in Chapter 7 of this title. In any action to condemn property or interests therein for such purposes, notice thereof shall be signed by the condemning county; and such notice shall be deemed to be the official action of the county in regard to the commencement of such condemnation proceedings. For good

cause shown a county, at any time after commencement of condemnation proceedings and prior to final judgment therein, may dismiss its condemnation action, provided that (i) the condemnation proceedings have not been instituted under Article 1 of Chapter 3 of this title, and (ii) the condemnor has first paid to the condemnee all expenses and damages accrued to the condemnee up to the date of the filing of the motion for dismissal of the condemnation action.

(B) Pursuant to the requirements of Part 2 of this article, a county shall have the power to purchase, borrow, rent, lease, control, manage, receive, and make payment for all personal property, such as equipment, machinery, vehicles, supplies, material, and furniture, which may be needed in the operation of its county road system; to lease, rent, lend, or otherwise transfer temporarily county property used for road purposes, as authorized by law; to sell or otherwise dispose of all personal property owned by the county and used in the operation of the county road system which is unserviceable; and to execute such instruments as may be necessary in connection with the exercise of the powers described in this subparagraph;

(4) A county and its authorized agents and employees may enter upon any lands in the county for the purpose of making such surveys, soundings, drillings, and examinations as the county may deem necessary or desirable to accomplish the purposes of this title; and such entry shall not be deemed a trespass nor shall it be deemed an entry which would constitute a taking in a condemnation proceeding, provided that reasonable notice of such entry shall be given the owner or occupant of such property, such entry shall be done in a reasonable manner with as little inconvenience as possible to the owner or occupant of the property, and the county

shall make reimbursement for any actual damages resulting from such entry;

(5) A county shall have the authority to employ, discharge, promote, set and pay the salaries and compensation of its personnel, and determine the duties, qualifications, and working conditions for all persons whose services are needed in the construction, maintenance, administration, operation, and development of its county road system; to work inmates maintained in the county correctional institution or inmates hired from the Department of Corrections and maintained by the latter; and to employ or contract with such engineers, surveyors, attorneys, consultants, and all other employees as independent contractors whose services may be required, subject to the limitations of existing law;

(6) A county may grant permits and establish reasonable regulations for the installation, construction, maintenance, renewal, removal, and relocation of pipes, mains, conduits, cables, wires, poles, towers, traffic and other signals, and other equipment, facilities, or appliances of any utility in, on, along, over, or under the public roads of the county which are a part of the county road system lying outside the corporate limits of a municipality. However, such regulations shall not be more restrictive with respect to utilities affected thereby than are equivalent regulations promulgated by the department with respect to utilities on the state highway system under authority of Code Section 32-6-174. As a condition precedent to the granting of such permits, the county may require application in writing specifically describing the nature, extent, and location of the portion of the utility affected and may also require the applicant to furnish an indemnity bond or other acceptable security conditioned to pay any damages to any part of the county road system or to any member of the public

caused by work of the utility performed under authority of such permit. At all times it shall be the duty of the county to ensure that the normal operation of the utility does not interfere with the use of the county road system. The county may also order the removal or discontinuance of the utility, equipment, facility, or appliances where such removal and relocation are made necessary by the construction or maintenance of any part of the county road system lying outside the corporate limits of a municipality. In so ordering the removal and relocation of a utility or in performing such work itself, the county shall conform to the procedure set forth for the department in Code Sections 32-6-171 and 32-6-173, except that when the removal and relocation have been performed by the county, it shall certify the expenses thereof for collection to its county attorney;

(7) A county shall have the power to purchase supplies for county road system purposes through the state as authorized by Code Sections 50-5-100 through 50-5-102;

(8) In addition to any taxes authorized by Article 4 of Chapter 5 of Title 48 to be levied and collected for the construction and maintenance of its county road system and activities incident thereto, a county is authorized to levy and collect any millage as may be necessary for such purposes;

(9) A county may provide for surveys, maps, specifications, and other things necessary in designating, supervising, locating, abandoning, relocating, improving, constructing, or maintaining the county road system, or any part thereof, or any activities incident thereto or necessary in doing such other work on public roads as the county may be given responsibility for or control of by law;

(10) In addition to the powers specifically delegated to it in this title and except as otherwise provided by Code Section 12-6-24, a county shall have the authority to adopt and enforce rules, regulations, or ordinances; to require permits; and to perform all other acts which are necessary, proper, or incidental to the efficient operation and development of the county road system; and this title shall be liberally construed to that end. Any power vested in or duty placed on a county but not implemented by specific provisions for the exercise thereof may be executed and carried out by a county in a reasonable manner subject to such limitations as may be provided by law; and

(11) In all counties of this state having a population of 550,000 or more according to the United States decennial census of 1970 or any future such census, the county governing authority shall be empowered by ordinance or resolution to assess against any property the cost of reopening, repairing, or cleaning up from any public way, street, road, right of way, or highway any debris, dirt, sediment, soil, trash, building materials, and other physical materials originating on such property as a result of any private construction activity carried on by any developer, contractor, subcontractor, or owner of such property. Any assessment authorized under this paragraph, the interest thereon, and the expense of collection shall be a lien against the property so assessed coequal with the lien of other taxes and shall be enforced in the same manner as are state and county ad valorem property taxes by issuance of a fi. fa. and levy and sale as set forth in Title 48, known as the "Georgia Public Revenue Code."

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

[Filed June 10, 2005]

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Case No. CV403-099

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ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR., and CAROL C. LUDWIG,
*Plaintiffs*,

v.

CHATHAM COUNTY, GEORGIA,
*Defendant*.

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ORDER

Before the Court is Plaintiffs' Renewed Rule 60(b) Motion for Relief from this Court's June 28, 2004 Order granting Defendant summary judgment. (Doc. 34.) For the Reasons stated below, Plaintiffs' Motion is DENIED.

Plaintiffs filed this action in admiralty alleging that a raised span of the Causton Bluff draw bridge, which is owned and operated by Defendant, dropped and struck Plaintiff James Ludwig's yacht as it attempted to pass beneath the bridge. Defendant moved for summary judgment on sovereign immunity grounds, and by Order dated June 28, 2004, the Court granted that motion. In so doing, the Court explained that Defendant was entitled to summary judgment on grounds of "residual sovereign immunity" provided by common law and not Eleventh Amendment sovereign immunity. (Doc. 27 at 6-11.) Plaintiffs appealed this ruling to the Eleventh Circuit Court of Appeals. *Zurich Ins. Co. v. Chatham County*, No. 04-13308 (11th Cir. Jan. 28, 2005). The Court of Appeals affirmed the

dismissal of Plaintiffs' claims and reiterated this Court's reasoning that Defendant was protected from suit by residual immunity and not Eleventh Amendment immunity. *Id.* at 2-3.

Plaintiffs now argue that the Court should reconsider the dismissal of its claims due to the Georgia Supreme Court's decision in *Hines v. Georgia Ports Authority*, 278 Ga. 631 (2004). In that case, the court held that the Georgia Ports Authority is not an arm of the state entitled to sovereign immunity. *Hines*, 278 Ga. at 195. However, the court only applied Eleventh Amendment sovereign immunity law and did not discuss residual immunity. *Id.* Accordingly, *Hines* provides no grounds for the Court to disturb its previous rulings that Defendant is protected from suit by residual immunity.

Furthermore, the Eleventh Circuit issued its opinion affirming the dismissal of Plaintiffs' claims and reiterating this Court's residual immunity analysis several months after the Georgia Supreme Court issued its decision in *Hines* on October 12, 2004. Plaintiffs have failed to explain why the Court should issue an Order essentially overturning a decision of the Court of Appeals based on case law that was available to the Plaintiffs and the court on appeal.[1] Accordingly, Plaintiffs' Renewed Rule 60(b) Motion for Relief is DENIED, and this case remains CLOSED.

SO ORDERED, this 10th Day of June, 2005.

/s/ William T. Moore, Jr.,
WILLIAM T. MOORE, JR., Chief Judge
United States District Court
Southern District Of Georgia

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[1] Though *Hines* was decided days after Plaintiffs submitted their appellate brief, Plaintiffs could have alerted the Court of Appeals to the decision pursuant to Federal Rule of Appellate Procedure 28(j). Rule 28(j) provides in part, "if pertinent and significant authorities come to a party's attention after the party's brief has been filed . . . a party may advise the circuit clerk by letter . . . ."

## APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

[Filed April 25, 2005]

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No. 403CV038

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DENNIS K. RINGS and CONTINENTAL INSURANCE COMPANY,
*Plaintiffs,*

v.

CHATHAM COUNTY, GEORGIA,
*Defendant.*

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### ORDER

Plaintiffs Dennis K. Rings and Continental Insurance Company move this Court for F.R.Civ.P. 60(b)[1] relief from its 1/14/04 Order granting summary judgment to defendant Chatham County, Georgia (the County).

Plaintiffs' underlying admiralty action arose from damages sustained when a span of the Causton Bluff draw bridge, owned and operated by the County, struck Rings' vessel as it passed beneath the bridge. Doc. # 1. Although the County admitted that the drifting span damaged Rings' boat, it suc-

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[1] Plaintiffs seek relief under Rule 60(b)(1) or alternatively under Rule 60(b)(6). The Rule provides in relevant part that

> [o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment.

cessfully moved for summary judgment on sovereign immunity grounds. Doc. ## 16, 17, 36.

In granting that motion, the Court explained that

> [t]he County is "not asserting sovereign immunity based on the Eleventh Amendment immunity," doc. # 25 at 1 (emphasis added), a defense a Florida county unsuccessfully invoked in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003). Rather, it raises "common law" sovereign immunity illuminated in *Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994) and *Federal Maritime Comm'n v. S. C. State Ports Auth.*, 535 U.S. 743, 753 (2002). . . .

Doc. # 36 at 1. After finding that residual sovereign immunity applied in the admiralty context, the Court considered whether the County was "part of the State" for immunity purposes. *Id.* at 3. Rather than applying the four-factor test used in Eleventh Amendment cases, the Court instead relied on "the broader swath of residual sovereign immunity." *Id.* Under that theory of immunity, courts "scrutinize the overall intent and contour of the county entity, along with the stream of State power in which it navigates" to determine whether it was acting as an arm of the state. *Id.*

Though counties are not protected by Eleventh Amendment immunity, *see Vierling*, 339 F.3d at 1314-15, when applying residual sovereign immunity, the Court held that counties "are political subdivisions of the State entitled to the same sovereign immunity as the State when they exercise State powers." Doc. # 36 at 6 (emphasis added). It then determined that the "County, in acquiring the land and constructing/operating the public highway and bridge [here], exercised that very State power." *Id.* Hence, it was entitled to residual sovereign immunity, requiring dismissal of the case.

On appeal, plaintiffs argued that this Court erred in its "determination that Georgia State law should be used to

evaluate whether Chatham County was an arm of the State of Georgia." Doc. # 44 at 2. They also contended that "in admiralty cases, the Eleventh Amendment and the `residual common law sovereign immunity' are fundamentally identical in the type and source of their immunity." *Id.*

So, plaintiffs concluded, they can sue the County since it is not immune. The appeals court rejected these arguments and adopted this Court's analysis of "common law" sovereign immunity verses Eleventh Amendment sovereign immunity. *Id.* at 3; doc. # 42.

In requesting Rule 60(b) relief, plaintiffs now argue that shortly after the Eleventh Circuit ruled, the Georgia Supreme Court addressed this very issue in *Hines v. Georgia Ports Authority*, 278 Ga. 631 (2004). Doc. # 44 at 6-7. There the court determined that the Georgia Ports Authority is not an arm of the state entitled to sovereign immunity. *Hines*, 278 Ga. at 195. However, the *Hines* court did not even mention residual/common law sovereign immunity, let alone discuss its ramifications. *Id.* Instead, that court applied only Eleventh Amendment sovereign immunity law, *id.* at 192-95, which this Court specifically distinguished. Doc. # 36 at 1, 5. Hence, that case provides no insight on whether the "arm of the state" test should be the same under both forms of sovereign immunity.

Moreover, several months after the *Hines* decision, the Eleventh Circuit cited this Court's analysis in a separate case holding that Chatham County does have residual sovereign immunity when operating the Causton Bluff Bridge. *Zurich Ins. Co. v. Chatham County, Georgia*, No. 04-13308 at 5-6 (11th Cir. 1/28/05) (unpublished).

Plaintiffs also argue that this Court erred in relying on Georgia case law, and that "[t]here is simply no basis for having separate tests for determining whether a political subdivision is an `arm of the state' under the Eleventh Amend-

ment and the residual common law sovereign immunity." Doc. # 49 at 7. These arguments were rejected on direct appeal. Doc. # 44 at 2; doc. # 42. They therefore cannot be relitigated under Rule 60(b) absent some extraordinary circumstance, which does not exist here. *See Carter v. Dolce*, 741 F.2d 758, 760 (5th Cir. 1984) (Rule 60(b) "may not be used merely to relitigate settled issues"); *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir.1986) (Rule 60(b)(6) requires extraordinary circumstances justifying relief from extreme and undue hardship); *Schiavo ex rel. Schindler v. Schiavo*, __ F.3d __, 2005 WL 681652 at *1 (11th Cir. 3/25/05) (the law-of-the-case doctrine precludes courts from revisiting issues decided explicitly or by necessary implication in a prior appeal).

Accordingly, the motion (doc. # 44) of plaintiffs Dennis K. Rings and Continental Insurance Company for F.R.Civ.P. 60(b) relief from judgment is *DENIED*. This case remains *CLOSED*.

This 22nd day of April, 2005.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD, Judge
United States District Court
Southern District of Georgia